

Judge Settle

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEREK HOYTE, COLUMBIA CREST
PARTNERS, LLC, and COLUMBIA PACIFIC
ENTERPRISES, INC.,

Defendants,

CASE NO. C10-2044BHS

**CONSENT DECREE BETWEEN
PLAINTIFF UNITED STATES OF
AMERICA AND DEFENDANTS
DEREK HOYTE, COLUMBIA
CREST PARTNERS, LLC, AND
COLUMBIA PACIFIC
ENTERPRISES, INC.**

WHEREAS the locus of this lawsuit is certain real property located in Skamania County, Washington, of approximately 80 acres in size, commonly identified by the mailing address of 22962 State Highway 14, Washougal, Washington; and

WHEREAS the legal description of the aforesaid property is as follows:

PARCEL I

A portion of the South half of the South half of Section 17 and Government Lots 1, 2 and 3, in Section 20, all In Township 1 North, Range 5 East, Willamette Meridian, Skamania County, Washington, described as follows:

BEGINNING at the Intersection of the South right of way line of State Highway 14, with the East line of the West 390 feet of Government Lot 1, said point being the most Westerly Northwest corner of the Grams Tract as described In Book 50 of Deeds at page 31 (recorded June 25, 1962), Skamania County Auditor's Records; thence Northeasterly along the South right of way of State Highway 14 for a distance of 215 feet, more or less, to the Northwest corner of the excepted parcel noted in the Grams Tract; thence South 73.45 feet, more or less, to the Southwest corner of said

excepted parcel; thence North 84°30' East 162.00 feet to the Southeast corner of said excepted parcel; thence North along the East line of said excepted parcel, 110 feet, more or less, to the South right of way line of State Highway 14; thence Northeasterly along said South right of way line 145 feet, more or less, to the North line of Section 20; thence East along the line between Sections 17 and 20 for a distance of 1000 feet, more or less, to a point that is 1850 feet East of the Southwest corner of Section 17, said point being the Southeast corner of the U.S.A. Tract as described In Book 121 of Deeds, at page 379, Skamania County Auditor's Records; thence North 268 feet, more or less, to the South right of way line of State Highway 14 and the Northeast corner of the U.S.A. Tract; thence Northeasterly and Easterly along said South right of way line 2500 feet, more or less, to a point that is 140.00 feet Westerly (as measured along said right of way line) from Engineer's Station 331+00, 50.00 feet right (Sheet 3 of 6, State Road No. 8, Wing Creek to Prindle, dated June 24, 1927); thence South (parallel with the West line of Government Lot 1 of Section 20), 970.00 feet; thence Southwesterly 3750 feet, more or less, to a point on the East line of the West 390 feet of Government lot 1, that is 810.00 feet South of the Point of Beginning; thence North 810.00 feet to the Point of Beginning.

PARCEL II

That portion of the Southwest quarter of Section 17, Township 1 North, Range 5 East of the Willamette Meridian, Skamania County, Washington, lying Southerly of the Southerly right of way line of the Evergreen Highway as presently located and established. EXCEPTING the following described tract of land:

BEGINNING at a point on the South line of the said Section 17, a distance of 1850 feet East of the Southwest corner of the said Section 17; thence North 268.5 feet, more or less, to the Southerly right of way line of the said Evergreen Highway; thence in an Easterly direction along the Southerly line of the said highway to the center line running North and South through the said Section 17; thence South along the said center line to the quarter corner on the South line of the said Section 17; thence West along the South line of the said Section 17 to the Point of Beginning.

WHEREAS at all relevant times, the real property described above, which shall hereafter be referred to herein as the "Gorge Property," is and continues to be, located entirely within a Special Management Area of the Columbia River Gorge National Scenic Area; and

WHEREAS on March 31, 1995, plaintiff United States of America purchased from Richard E. and Helen D. Grams, owners in fee of the Gorge Property, an easement against a portion of the Gorge Property identified in the legal description set forth above as "Parcel I," which may also hereafter be referred to in this Consent Decree as the "Subject Parcel." The terms of the easement are embodied in a Conservation Easement Deed, which shall hereafter be referred to in this Consent Decree as the "Conservation Easement Deed," and which was duly executed by the parties and recorded in Skamania County on April 13, 1995; and

WHEREAS on July 29, 2005, Richard E. and Helen D. Grams entered into a Real Estate Contract with defendants Derek A. Hoyte and Columbia Crest Partners, L.L.C., for the purchase and sale of the Gorge Property, including the Subject Parcel, which was duly executed by the parties and recorded in

1 Skamania County on August 18, 2005, whereby, among other things, defendants Derek A. Hoyte and
2 Columbia Crest Partners, L.L.C., agreed to comply with the Conservation Easement Deed in their future
3 uses of the Subject Parcel; and

4 WHEREAS defendant Derek A. Hoyte, is an individual, and a resident of the State of Washington,
5 whose principal address is 3618 SE 327th Avenue, Washougal, Washington, 98671; and

6 WHEREAS defendant Columbia Crest Partners, L.L.C., is a presently “inactive” Washington
7 limited liability company assigned UBI Number 602303274, whose founding members were defendants
8 Derek A. Hoyte and Columbia Pacific Enterprises, Inc., and whose principal place of business was
9 identified as 2075 52nd Court, Washougal, Washington, 98671; and

10 WHEREAS defendant Columbia Crest Partners, L.L.C., was administratively dissolved as of
11 October 1, 2008, by the Washington Secretary of State due to its failure to renew its license within the
12 time set forth by law; and

13 WHEREAS defendant Columbia Pacific Enterprises, Inc., is an active Washington corporation
14 assigned UBI Number 602300893, whose President is defendant Derek A. Hoyte and whose principal
15 place of business is 3618 SE 327th Avenue, Washougal, Washington, 98671; and

16 WHEREAS defendants Derek Hoyte, Columbia Crest Partners, L.L.C., and defendant Columbia
17 Pacific Enterprises, Inc., hereby stipulate and agree that they are each bound by the terms of the
18 Conservation Easement Deed; and

19 WHEREAS defendant Derek Hoyte and defendant Columbia Pacific Enterprises, Inc., hereby
20 stipulate and agree that for purposes of the Conservation Easement Deed, and any necessary
21 enforcement thereof by the United States, that they are each fully and jointly responsible for their
22 actions and inactions, including those of their agents, employees, representatives and contractors and
23 anyone acting on their behalf in regards to the Subject Parcel, and that they are also fully and jointly
24 responsible for the actions and inactions of defendant Columbia Crest Partners, L.L.C., irrespective of
25 its legal status, including those of its agents, employees, representatives and contractors and anyone
26 acting on its behalf in regards to the Subject Parcel, and they hereby represent that they have full
27 authority to act not only on their own behalf but on behalf of Columbia Crest Partners, L.L.C., in regards
28 to all matters which are the subject of this Consent Decree; and

1 WHEREAS defendants Derek Hoyte, Columbia Crest Partners, L.L.C., and defendant Columbia
2 Pacific Enterprises, Inc., hereby stipulate and agree that they are each jointly and severally bound by the
3 terms of this Consent Decree; and

4 WHEREAS defendants further stipulate and agree that no part of defendant Derek Hoyte's
5 liability to the United States as alleged in this lawsuit was subject to discharge or discharged as a result
6 of the Order of Discharge issued on November 12, 2010, by the United States Bankruptcy Court for the
7 Western District of Washington in In re Derek Hoyte, Case No. 10-46172, because the liability was not
8 dischargeable pursuant to 11 U.S.C. § 523(a)(6) or 11 U.S.C. § 523(a)(7), or because the liability did not
9 involve a "debt" within the meaning of 11 U.S.C. § 101(12), or because the liability accrued after the
10 filing of the bankruptcy petition, or because of any combination of the four, and defendants, being fully
11 informed in the matter, hereby waive any right to assert in any forum or proceeding that this Consent
12 Decree, or any responsibility imposed upon defendants in this Consent Decree for any actions taken by
13 Derek Hoyte, were discharged or otherwise rendered unenforceable by the November 12, 2010, Order of
14 Discharge; and

15 WHEREAS on December 20, 2010, plaintiff United States of America filed a complaint herein
16 against defendants Derek Hoyte and Columbia Crest Partners, L.L.C., alleging in substance that
17 defendants by their actions as alleged in the complaint had breached certain terms of the Conservation
18 Easement Deed, trespassed on National Forest System land owned by the United States and
19 administered by the United States Forest Service which adjoins the Gorge Property, and committed a
20 timber trespass in regards to trees on the Subject Parcel and on the adjoining National Forest System
21 land; and

22 WHEREAS on September 20, 2011, the United States, with leave of the Court, filed a first
23 amended complaint by which it asserted an additional cause of action against defendants for violating
24 Section 404 of the Clean Water Act, 33 U.S.C. § 1344, based on allegations that defendants had placed
25 fill material in wetlands on Parcel I of the Gorge Property which constitute waters of the United States
26 for purposes of the Clean Water Act; and

27 WHEREAS on December 10, 2012, the United States, with leave of the Court, filed a second
28 amended complaint by which it joined as a party-defendant Columbia Pacific Enterprises, Inc., on all

1 causes of action; and

2 WHEREAS the Court, by Order entered December 17, 2012, determined that defendants had
3 discharged fill material into waters of the United States during the construction of certain roads on
4 Parcel I of the Gorge Property without a permit issued by the U.S. Army Corps of Engineers in violation
5 of Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a); and

6 WHEREAS plaintiff United States and defendants now wish to settle and compromise this legal
7 action; and

8 WHEREAS in furtherance thereof, this Consent Decree is intended to constitute a complete and
9 final settlement of all remaining claims and disputes at issue in the above-captioned lawsuit as between
10 plaintiff United States of America and defendants; and

11 WHEREAS plaintiff United States of America and defendants agree that this settlement is in the
12 public interest and that entry of this Consent Decree is the most appropriate means of resolving the
13 remaining issues in dispute between plaintiff United States of America against defendants in this case;
14 and

15 WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the
16 remaining claims of plaintiff United States of America against defendants in this case, and that this
17 Consent Decree adequately protects the public interest in accordance with the Clean Water Act, and all
18 other applicable federal laws,

19 NOW THEREFORE, without further adjudication of any issue of fact or law, and upon consent of
20 the parties hereto and their authorized representatives, it is hereby ORDERED, ADJUDGED and
21 DECREED as follows:

22 I. JURISDICTION AND VENUE

- 23 1. This Court has jurisdiction over the subject matter of this action and over the parties.
- 24 2. Venue is proper in the Western District of Washington

25 II. APPLICABILITY

26 3. Insofar as this Consent Decree obligates defendants to pay civil penalties and damages to the
27 United States and imposes upon them an obligation to take actions to mitigate damage and restore the
28 Subject Parcel, those obligations shall be personal obligations of defendants, jointly and severally, and

1 shall remain so regardless of any subsequent voluntary alienation or conveyance by them of all or a part
 2 of their interest in the Subject Parcel. In the case of any voluntary alienation or conveyance by them of
 3 their interest in all or a part of the Subject Parcel prior to their completion of the aforesaid obligations to
 4 the satisfaction of authorized representatives of the U.S. Forest Service, defendants shall retain sufficient
 5 rights in the Subject Parcel to enable them to fulfill their obligations under this Consent Decree.

6 4. All other provisions of this Consent Decree shall apply to and be binding upon defendants,
 7 their representatives, agents, employees, devisees, heirs and assigns, and persons present on the Subject
 8 Parcel with their knowledge and consent, as well as to any other person who shall hereafter acquire an
 9 interest in the Subject Parcel by whatever method or means.

10 5. It is understood and expressly agreed that, except where otherwise expressly and
 11 unequivocally stated in this Consent Decree, the obligations imposed by this Consent Decree shall run
 12 with the land and shall be binding on any and all successors-in-interest to the Gorge Property, whether
 13 by purchase or otherwise. At least thirty (30) days prior to the voluntary transfer of any interest in the
 14 Gorge Property, defendants, or any other party making such transfer on their behalf, shall provide
 15 written notice and a true copy of this Consent Decree to the putative successor-in-interest and shall
 16 simultaneously give such notice of the contemplated transfer to the United States Attorney for the
 17 Western District of Washington; the Area Manager for the Columbia River Gorge National Scenic Area,
 18 United States Forest Service; and the District Engineer, Seattle District, U.S. Army Corps of Engineers.
 19 In the case of an involuntary transfer, defendants shall by the most expedient means available provide
 20 the notice specified in the preceding sentence as soon as practicable and in no event later than 72 hours
 21 after defendants are first made aware of the possibility of an involuntary transfer. However, the failure
 22 to give the notice required by this paragraph shall in no way affect the validity of this Consent Decree
 23 nor diminish in any way its enforceability or its binding effect on successors-in-interest to the Gorge
 24 Property.

25 6. In the future should Parcel I and Parcel II of the Gorge Property be, in accordance with
 26 applicable law, sold separately, it is understood and agreed by the parties to this Consent Decree that
 27 Parcel II may be sold free and clear of any obligation imposed by this Consent Decree which runs with
 28 the land and that such obligations as to Parcel II shall cease upon the consummation of the sale and the

1 recording of title in Skamania County, but the obligations imposed by this Consent Decree which run
2 with the land shall continue to apply to Parcel I, at all times.

3 III. ADJUDICATED VIOLATIONS AND ADMISSIONS

4 7. The Court has determined as a matter of law that commencing in 2006, defendants violated
5 Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, by discharging fill material into
6 navigable waters of the United States on the Gorge Property within the Subject Parcel without first
7 having obtained a permit to do so by the U.S. Army Corps of Engineers although a permit for such
8 activity was required by statute. Upon the entry of this consent decree this violation of Section 404 of
9 the Clean Water Act, 33 U.S.C. § 1344, shall be deemed to be a finally adjudged violation of the Clean
10 Water Act against all defendants and in favor of the United States.

11 8. Except as set forth in the preceding paragraph, or elsewhere stated in this Consent Decree,
12 nothing in this Consent Decree shall constitute an admission of fact or law by any party.

13 IV. SCOPE OF CONSENT DECREE

14 9. This Consent Decree shall constitute a complete and final settlement of all claims for
15 damages, injunctive relief and civil penalties alleged in the Second Amended Complaint against
16 defendants.

17 10. It is an express purpose of the parties in entering this Consent Decree to further the
18 objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree or
19 resulting from the activities required by this Consent Decree as a consequence of the violation of the
20 Clean Water Act by defendants shall have the objective of causing defendants to achieve and maintain
21 full compliance with, and to further the purposes of, the CWA.

22 11. This Consent Decree is not and shall not be interpreted to be, a permit or modification of
23 any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or
24 any other law. Nothing in this Consent Decree shall limit the ability of the U.S. Army Corps of
25 Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional
26 general permit, nor shall this Consent Decree limit the ability of the U.S. Army Corps of Engineers or
27 the Environmental Protection Agency (EPA) to exercise their authority pursuant to Section 404(c) of the
28 CWA, 33 U.S.C. § 1344(c).

12. This Consent Decree in no way affects or relieves defendants or their heirs, assigns, and successors in interest of their responsibility to comply with any applicable federal, state, or local law, ordinance, regulation or permit.

13. This Consent Decree in no way affects or relieves defendants or their heirs, assigns, and successors in interest of their responsibility to comply with the Conservation Easement Deed purchased by the United States of America in the Subject Parcel and recorded in Skamania County on April 13, 1995, nor does it adversely affect or diminish the rights of the United States under the Conservation Easement Deed.

14. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

15. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

16. This Consent Decree is not a settlement of, and in no way affects, the rights of the United States to seek penalties, injunctive relief, or remedial actions with respect to any violation by defendants of federal, state, or local laws, regulations, or permit conditions, not alleged in the Second Amended Complaint.

V. SPECIFIC PROVISIONS

A. INJUNCTIVE RELIEF

17. Defendants are hereby permanently enjoined from taking any actions, or causing others to take any actions, on the Subject Parcel which results in the discharge of dredged or fill material into waters of the United States, as defined by the CWA and regulations promulgated thereunder, except as in compliance with an individual permit issued pursuant to CWA Section 404(a), 33 U.S.C. § 1344(a), or with any applicable general permit, including all prescribed national and local conditions, issued by the United States Army Corps of Engineers, unless the discharge meets all of the conditions specified in one of the exceptions set forth in Section 404(f)(1) of the Clean Water Act, 33 U.S.C. § 1344(f)(1), and implementing regulations, is in compliance with all prescribed national and local conditions, including, but not limited to, preconstruction notification to the District Engineer, Seattle District, U.S. Army Corps of Engineers and, pursuant to Section 404(f)(2), of the Clean Water Act, 33 U.S.C. § 1344(f)(2),

1 is not incidental to any activity having as its purpose bringing an area of the navigable waters into a use
2 to which it was not previously subject or where the flow or circulation of navigable waters is not
3 impaired or the reach of such waters is not reduced. Additionally, defendants shall not discharge any
4 dredged or fill material anywhere on the Subject Parcel without the prior express written prior approval
5 of an authorized representative of the U.S. Forest Service under Part III, Paragraph B of the
6 Conservation Easement Deed.

7 18. Defendants are hereby permanently enjoined from gaining access to adjoining National
8 Forest System land, or allowing others to gain access to or egress from adjoining National Forest System
9 lands, except by an officially marked road, trail or path which is specifically recognized and authorized
10 by the U.S. Forest Service as a point of access to or egress from the National Forest System land and
11 open to any member of the general public. This injunction shall apply to all unofficial roads, trails or
12 paths onto or across the adjoining National Forest System lands, including, but not limited to, the road
13 constructed by defendants from the site of the former Social Garden across National Forest System land
14 to the Columbia River.

15 19. Defendants are hereby permanently enjoined from gaining access to or egress from
16 adjoining National Forest System land, or allowing others to gain access to or egress from adjoining
17 National Forest System lands, except by a mode of travel which is specifically recognized and
18 authorized by the U.S. Forest Service on such National Forest System land. Such prohibited modes of
19 travel shall include, but not be limited to, any motorized vehicle, any motorized piece of equipment, any
20 mountain or trail bike, or any horse or other stock animal.

21 20. Defendants are hereby permanently enjoined from crossing adjoining National Forest
22 System land, or allowing others to cross adjoining National Forest System land, to reach either the
23 Columbia River or other parts of their land except by an officially marked road, trail or path which is
24 specifically recognized and authorized by the U.S. Forest Service as a point of access to or egress from
25 the National Forest System land and open to any member of the general public. This injunction shall
26 apply to all unofficial roads, trails or paths onto or across the adjoining National Forest System lands.
27 Nothing in this paragraph is intended to preclude defendants, upon entering National Forest Service land
28

1 by authorized points of access and egress, to walk upon and about National Forest Service land on the
2 same terms as any other member of the general public.

3 21. Nothing in paragraphs 18, 19, or 20 shall be construed to foreclose defendants from making
4 a request to the Area Manager of the Columbia River Gorge National Scenic Area for permission to
5 engage on isolated occasions in an activity that would otherwise be enjoined by the terms of those
6 paragraphs, provided that the request is made in writing reasonably in advance of the activity.
7 Defendants shall not engage in the activity unless and until written permission is received from the Area
8 Manager. Defendants agree that the Area Manager is under no obligation to grant the request and that
9 the Area Manager may deny the request for any reason. The decision of the Area Manager on any such
10 request shall be final. The parties agree that no rights are conveyed to defendants by this paragraph and
11 it is intended simply to reflect that the aforementioned paragraphs are not intended to foreclose
12 defendants from making requests for permission. Defendants agree that they shall have no recourse
13 from a denial of a request for such permission, either under this Consent Decree or otherwise, and they
14 specifically agree that Section VIII of this Consent Decree relating to Dispute Resolution does not apply
15 in regard to such requests and may not be invoked in regards to the Area Manager's response to such a
16 request. Should the Dispute Resolution provisions be invoked by defendants in regards to the Area
17 Manager's response to such a request, the provisions of paragraph 76 shall apply in like manner as in the
18 case of a dispute regarding the interpretation or construction of the terms of the Conservation Easement
19 Deed.

20 22. Defendants are hereby permanently enjoined from engaging in any ground disturbing
21 activity on the adjoining National Forest System land, or allowing others to engage in such activity on
22 the adjoining National Forest System land, including, but not limited to, the construction of any road,
23 trail or path.

24 23. Defendants are hereby permanently enjoined from engaging in any use or disturbance of any
25 foliage on the adjoining National Forest System land, or allowing others to use or to disturb foliage on
26 adjoining National Forest System land. This injunction shall include, but not be limited to, the felling of
27 any tree, the removal of any tree or any branches, the cutting up or removal of any downed tree for
28 firewood or otherwise, the removal, trimming or application of any chemical to any brush or foliage, the

1 removal or disturbance of any ground or ground cover, and the attachment of any object to any thing on
2 National Forest System land. These prohibitions shall apply regardless of the type, size, age, or
3 condition of the foliage.

4 24. Defendants are hereby permanently enjoined from bringing any equipment on to the
5 adjoining National Forest System land, or allowing others to bring equipment on to the adjoining
6 National Forest System land, mechanized or otherwise, including, but not limited to, any saw, any
7 cutting device, any vehicle and any piece of earthmoving equipment.

8 25. Defendants are hereby permanently enjoined from storing, depositing, or discharging any
9 item or substance on the adjoining National Forest System land, or allowing others to store, deposit or
10 discharge any substance on adjoining National Forest System lands. For purposes of this paragraph, a
11 discharge shall include not only substances which are discharged directly on National Forest System
12 land, but also discharges of substances on the Gorge Property which may foreseeably reach National
13 Forest System land.

14 26. Defendants are hereby permanently enjoined from making any alterations to the drainage
15 system on their land, or allowing others to make such alterations, which will result in drainage being
16 directed onto the adjoining National Forest System land.

17 27. Defendants are hereby permanently enjoined from engaging in any activity on the adjoining
18 National Forest System lands, or allowing others to engage in any activity on the adjoining National
19 Forest System lands, which is not an activity specifically authorized by the U.S. Forest Service for any
20 member of the general public.

21 28. Defendants are hereby permanently enjoined from inviting or allowing members of the
22 general public, or permitting others to invite or allow members of the general public to have access to
23 the Subject Parcel without the prior express written approval of an authorized representative of the
24 U.S. Forest Service under Part III, Paragraph B of the Conservation Easement Deed.

25 29. Defendants and their successors-in-interest are hereby permanently enjoined from owning or
26 operating, or allowing others to own or operate, any commercial enterprise of any kind on the Subject
27 Parcel without the prior express written approval of an authorized representative of the U.S. Forest
28

1 Service under Part III, Paragraph B of the Conservation Easement Deed. The term “commercial
2 enterprise” shall include any business venture of any kind, whether for profit or otherwise.

3 30. Defendants and their successors in interest are hereby permanently enjoined from granting
4 access or use of the Subject Parcel to any person, individual, entity or group, or allowing others to grant
5 such access or use, for any purpose in exchange for the payment of any form of compensation,
6 consideration, in-kind contribution, donation or gratuity to themselves or to any person, individual,
7 entity or group, without the prior express written approval of an authorized representative of the U.S.
8 Forest Service under Part III, Paragraph B of the Conservation Easement Deed. The term “any purpose”
9 in the foregoing sentence shall include, but not be limited to, spiritual or religious retreats and activities,
10 sightseeing, hiking, hunting, shooting, camping, biking, ziplining, rope swinging, parasailing,
11 paragliding, hang gliding, rock or rope climbing, motorized vehicle riding, horseback or stock animal
12 riding, purchasing or sampling of food or agricultural products, wine tasting, “u-pick,” and any other
13 form of visitor attraction, including, but not limited to, corn mazes, hay rides, and any other activity
14 associated with the terms “ecotourism” or “agritourism.” However, nothing herein is intended to
15 preclude defendants from continuing to grow hay and alfalfa on the Subject Parcel in the east and west
16 pastures which adjoin State Highway 14 at the same operational level as at present for their personal use
17 or for off-site sale, and nothing herein is intended to preclude defendants from allowing third parties to
18 have access to the east and west pastures of the Subject Parcel to the extent necessary to harvest hay and
19 alfalfa grown in the east and west pastures which adjoin State Highway 14 and to remove harvested hay
20 and alfalfa from the Subject Parcel to be sold elsewhere or used elsewhere. Further, nothing in this
21 paragraph is intended to preclude defendants from leasing out the existing residence on the Subject
22 Parcel for use only as a single family dwelling.

23 31. Defendants and their successors in interest are hereby permanently enjoined from
24 advertising, or allowing others to advertise, a commercial enterprise of any kind operating on the
25 Subject Parcel, including those activities identified above in Paragraph 30, without the prior express
26 written approval of an authorized representative of the U.S. Forest Service under Part III, Paragraph B of
27 the Conservation Easement Deed. The term “advertising” shall include, but not be limited to,
28

1 advertisements or commercial notices in any form, including websites, brochures, signs, mailings,
2 television or radio appearances or advertisements, and newspaper or magazine advertisements.

3 32. Defendants are hereby permanently enjoined from harming, disturbing or making any use of
4 any standing tree on the Subject Parcel, or allowing others to do so, regardless of size and regardless of
5 whether the tree is dead or alive, without the prior express written approval of an authorized
6 representative of the U.S. Forest Service under Part III, Paragraph B of the Conservation Easement Deed
7 with the following exceptions:

8 a. when the activity concerned involves the pruning, cutting or removal of that portion of any tree
9 located within 10 feet of any existing structure identified in the Conservation Easement Deed,

10 b. within the east or west pasture, provided that the tree is no larger than 1" diameter at breast
11 height ("dbh");

12 c. within the Social Garden Area identified in the Conservation Easement Deed to the extent
13 necessary to maintain or replace fruit trees planted within such area pursuant to paragraph 50(a) of this
14 Consent Decree, provided that the tree is no larger than 1" dbh: and

15 d. within any existing road identified under paragraphs 37(a) - (c) of this Consent Decree,
16 provided that the tree is no larger than 1" dbh.

17 For purposes of this paragraph, "use" shall include, but not be limited to, any cutting, removal, felling,
18 limbing, or trimming of a tree, the application of any chemical, and the attachment by any means of any
19 object, device, or hardware to any standing tree, the use of any tree as support for any object or device,
20 and the disturbance of the supporting ground or root structure of any standing tree.

21 33. Defendants are hereby permanently enjoined from disturbing, or allowing others to disturb,
22 any foliage on the Subject Parcel regardless of size and regardless of whether the foliage is dead or alive
23 without the prior express written approval of an authorized representative of the U.S. Forest Service
24 under Part III, Paragraph B of the Conservation Easement Deed, except that live foliage within 5 feet,
25 dead foliage within 10 feet, and any portion of a tree located within 10 feet of any existing structure
26 which is identified in the Conservation Easement Deed may be pruned without such approval. No such
27 approval shall be required when the activity concerned involves the pruning, cutting, or mowing of live
28 foliage located within the existing open areas identified in paragraph 32 of this Consent Decree.

1 However, nothing in this paragraph shall be construed to provide authority to defendants to widen or
2 expand the cleared area of any of the identified roads or areas beyond their present clearing limits
3 without the prior express written approval of an authorized representative of the U.S. Forest Service
4 under Part III, Paragraph B of the Conservation Easement Deed.

5 34. Defendants are hereby permanently enjoined from constructing any new road or improved
6 trail or path, improving any existing road, or constructing or maintaining any improved trail or path, or
7 allowing others to do so, on the Subject Parcel without the prior express written approval of an
8 authorized representative of the U.S. Forest Service under Part III, Paragraph B of the Conservation
9 Easement Deed. For purposes of this paragraph, the activities contemplated by the term “improving”
10 include, but are not limited to, all ground disturbing activities, including but not limited to clearing,
11 grubbing, excavating, scraping, filling, widening, expanding, ditching, hardening, surfacing, and
12 graveling. For purposes of this Consent Decree, an improved trail or path is one which is created or
13 maintained by any one or any combination of the improving activities identified in the preceding
14 sentence.

15 35. Defendants are hereby permanently enjoined from using or maintaining the road complex on
16 the Subject Parcel which connects the east pasture to the west pasture across the canyon that bisects the
17 Gorge Property on the Subject Parcel, including the spur road to the south facing cliffs, or allowing
18 others to use this road complex. The location of the road complex described in this Paragraph on the
19 Subject Parcel is depicted in Figure 1, which is incorporated herein by reference, and located in the area
20 identified as “Area 3 - Trail/Road Through Canyon.” Injury to the Subject Parcel associated with the
21 construction of this road complex shall be mitigated according to the provisions of this Consent Decree.
22 This road complex, including the spur road, also shall not be regarded to be existing roads within the
23 meaning of the Conservation Easement Deed and they shall not be used, improved or maintained in the
24 future by defendants or their successors-in-interest. Subject to Paragraph 62 of this Consent Decree,
25 nothing in the paragraph is intended to preclude defendants from making a future request to construct
26 new roads or trails on the Subject Parcel from an authorized representative of the U.S. Forest Service
27 under Part III, Paragraph B of the Conservation Easement Deed.

28 36. Defendants are hereby permanently enjoined from using or maintaining the road which

1 crosses National Forest System land and connects the Social Garden Area to the Columbia River, or
2 allowing others to use this road. The location of the road described in this Paragraph on the Subject
3 Parcel is depicted in Figure 1, which is incorporated herein by reference, and located with the area
4 identified as "Area 2 - Trail/Road To River." Injury to the Subject Parcel and the National Forest
5 System land associated with the construction of this road shall be mitigated according to the provisions
6 of this Consent Decree. That portion of the road which is situated on the Subject Parcel shall not be
7 regarded to be an "existing" road within the meaning of the Conservation Easement Deed and it shall
8 not be used as such, improved or maintained in the future by defendants or their successors-in-interest.
9 Subject to Paragraph 62 of this Consent Decree, nothing in the paragraph is intended to preclude
10 defendants from making a future request to construct new roads or trails on the Subject Parcel from an
11 authorized representative of the U.S. Forest Service under Part III, Paragraph B of the Conservation
12 Easement Deed,

13 37. Defendants are hereby permanently enjoined from making any improvements to any existing
14 road on the Subject Parcel, or allowing others to make improvements, without the prior express written
15 approval of an authorized representative of the U.S. Forest Service under Part III, Paragraph B of the
16 Conservation Easement Deed. For purposes of this Consent Decree, the term improvements shall
17 include, but not be limited to, widening, expanding, ditching, hardening, resurfacing, grading or
18 changing the course of any existing road, trail or path. For purposes of this Consent Decree, the parties
19 stipulate and agree that the following roads are the only existing roads on the Subject Parcel:

20 a. The road by which access and egress to State Highway 14 is acquired adjacent to the site of
21 the former service station which terminates near the existing residence on the Subject Parcel.

22 b. The road by which access is gained to the Social Garden from the residence on the subject
23 parcel as depicted in "Exhibit A" to the Conservation Easement Deed. The location of the road
24 described in this subparagraph on the Subject Parcel is depicted in Figure 1, which is incorporated
25 herein by reference, in the area identified as "Area 1 - Social Garden Home Site."

26 c. The road by which access to and egress from State Highway 14 is obtained from the east
27 pasture, which commences at State Highway 14 near Milepost 23.5, roughly parallels the western
28 treeline, and terminates near the southwest point of the east pasture.

38. For purposes of paragraphs 17 through 37 of this Consent Decree it is understood and agreed that the independent actions of third parties who are present on the Subject Parcel without the knowledge, permission or acquiescence of defendants or their successors-in-interest shall not constitute grounds for a violation of this Consent Decree.

B. CIVIL PENALTIES

39. Defendants shall pay the sum of TEN THOUSAND Dollars (\$10,000.00) as and for a civil penalty pursuant to Section 309 of the Clean Water Act, 33 U.S.C. § 1319, to the United States within 60 days of the date of entry of this Consent Decree. Payment shall be made in accordance with instructions provided to defendants by the Financial Litigation Unit of the United States Attorney's Office for the Western District of Washington.

40. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

C. DAMAGES

41. Defendants shall pay the sum of NINETY THOUSAND Dollars (\$90,000.00) as and for damages in compensation for injuries caused to the Subject Parcel from defendants' activities as alleged in the Second Amended Complaint. Defendants shall be jointly and severally responsible for the payment of this sum. This shall be a personal obligation of defendants which is neither transferable nor assignable to third parties. The parties hereby stipulate and agree that the foregoing constitutes a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(6).

42. The foregoing sum may be paid by defendants in monthly installments over a period of ten years with interest, until paid in full. The first monthly installment payment will be due and payable one year after the date of entry of this Consent Decree. Interest shall be calculated at a rate equal to the weekly average 1 year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the entry of this Consent Decree. Interest shall be computed daily to the date of full payment, and shall be compounded annually. Payment shall be made electronically in accordance with instructions provided to the defendants by the Financial Litigation Unit of the United States Attorney's Office for the Western District of Washington. Said

1 instructions will include a schedule for the payment of monthly installments and the amount of each
2 installment.

3 43. In the event that a monthly installment is not fully paid within 30 days of the due date for
4 such installment, defendants shall be deemed to be in default on their payment obligations under this
5 Consent Decree and an additional penalty of \$50.00 per day shall automatically be added to the amount
6 of the overdue installment commencing on the 31st day that the installment is overdue. An installment
7 shall not be considered fully paid and defendants shall remain in default until the full amount of the
8 installment plus any additional penalty accruing under this paragraph, is received by the United States
9 Attorney.

10 44. If defendants are in default on their payment obligations under this Consent Decree for any
11 period of time in excess of 60 days, the United States may, at its sole discretion, decide to accelerate the
12 indebtedness at any time thereafter. If the United States decides to accelerate the indebtedness, the full
13 unpaid amount of the sum specified in Paragraph 41 as of the date of the acceleration, including any
14 amounts owed to the United States as the result of overdue payments together with any accrued interest,
15 shall be immediately due and payable in full as of the date of the acceleration. The United States shall
16 give notice to defendants of its decision to accelerate the debt, and the resulting amount of the
17 indebtedness, by sending a letter by regular or certified mail to:

18
19 Derek A. Hoyte
Columbia Pacific Enterprises, Inc.
20 P.O. Box. 646
Haiku, Hawaii 96708

21 Notwithstanding any acceleration of the indebtedness pursuant to this paragraph, interest shall continue
22 to accrue until the debt is retired in full. The United States may, at its sole discretion, decide to
23 withdraw an acceleration of the debt on such terms as it deems appropriate and may do so without
24 prejudice to its ability to accelerate the debt again in the future.

25 45. At any time after notice is sent to defendants of its decision to accelerate the debt, the United
26 States may initiate collection procedures as set forth herein. The United States may, but is not required
27 to invoke the dispute resolution provisions set forth in Section VIII of this Consent Decree before
28 initiating collection proceedings. The United States may make application to the Court for the issuance

of the entry of a separate judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for the total amount of the indebtedness upon providing the Court with evidence of the remaining principal amount due, plus any accrued penalty amounts, plus accrued interest. Defendants hereby stipulate and agree that, in opposition to such an application, they may contest only the amount of the outstanding indebtedness claimed by the United States. Upon a finding that there is no just reason for delay, the Court may, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, enter a judgment for the amount it determines is due and owing. Defendants hereby stipulate and agree that any such judgment is non-dischargeable in bankruptcy and that they will not seek to discharge the judgment in bankruptcy. It is further understood and agreed that the United States may pursue any and all avenues of collection to execute on this judgment under federal and state law, including those remedies available under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001, et seq. Defendants hereby stipulate and agree that should the United States be required to initiate collection efforts, defendants shall not claim the Gorge Property, or such interest that they hold in the Gorge Property, to be an exempt property under any statutory collection procedure which allows for the exemption of certain assets or property for purposes of collection. If it is necessary for the United States to initiate collection procedures, defendants shall be jointly and severally responsible for the reasonable attorney's fees, costs, and expenses, of the United States in collecting the judgment until the full amount of the outstanding indebtedness is collected in full. The United States may apply to the Court for a supplemental judgment under this paragraph to recover its reasonable attorney's fees, expenses and costs incurred, as proved to the satisfaction of the Court, and such judgment may be entered, enforced and collected in the same manner as a judgment to recover in the event of a default, as set forth above.

46. Defendants agree that they shall file no action or proceeding, judicial or administrative, nor seek any legal remedy against the United States, its agencies, officers, or employees, in order to assert that the U.S. Forest Service has violated the Conservation Easement Deed by refusing to grant to defendants or any other person approval to engage in a particular use of the Subject Parcel until the total amount of damages, including any additional sums owed due to late payments, as well as any and all accrued interest, and any supplemental attorney's fees, costs and expenses owed to the United States, have been paid in full by defendants. The applicable statute of limitations on any such claim or cause of

1 action by defendants shall not be tolled during the time that defendants are precluded from filing an
 2 action or legal proceeding under this paragraph. Nothing in this paragraph shall be construed to be an
 3 admission or concession by the United States that subject matter jurisdiction exists for such an action or
 4 proceeding against the United States. Further, nothing in this paragraph shall be construed as a waiver
 5 of any defense that the United States may have to such an action or proceeding, including, but not
 6 limited to a defense that any such claim is time-barred.

7 D. RESTORATION AND MITIGATION

8 47. Defendants shall be required to restore and mitigate injury caused to the Subject Parcel and
 9 adjoining National Forest System land in accordance with the terms of a mitigation plan which will be
 10 developed as set forth herein. Mitigation shall encompass resource damage caused in the following
 11 areas of the Subject Parcel and adjoining National Forest System land: (1) the Social Garden; (2) the
 12 road from the Social Garden to the Columbia River; (3) the cross-canyon road, spur road, associated
 13 wetlands and perennial stream; (4) all zipline corridors and landings.

14 *i. Plan Development*

15 48. By no later than three months from the date of approval of an independent contractor by the
 16 U.S. Forest Service and the U.S. Army Corps of Engineers, as set forth below, defendants shall submit a
 17 detailed mitigation plan to the U.S. Forest Service and the U.S. Army Corps of Engineers. The
 18 mitigation plan must be prepared by an independent contractor who is qualified by education, training
 19 and experience to prepare such plans. The independent contractor shall be selected by defendants,
 20 subject to approval of the U.S. Forest Service and the U.S. Army Corps of Engineers. Defendants shall
 21 submit the name and qualifications of the proposed independent contractor to the U.S. Forest Service
 22 and the U.S. Army Corps of Engineers no later than one (1) month after the date of entry of this Consent
 23 Decree. In particular, the independent contractor should have demonstrated experience in the
 24 development of plans for the remediation of damage to wetlands and streams, as well as having
 25 knowledge and experience in reforestation, remediation of road damage and factors affecting soil
 26 stability. The independent contractor must not be related to defendants nor may the independent
 27 contractor be someone who has had a prior knowledge of or business dealings with any of the
 28 defendants. The independent contractor shall consult with defendants and with designated

representatives of the U.S. Forest Service and the U.S. Army Corps of Engineers in the development of the mitigation plan including, but not limited to, defining the goals and objectives of the plan as well as the specific actions necessary to accomplish those goals and objectives. The independent contractor may also consult with other qualified specialists as necessary in devising the plan. Defendants shall be solely responsible for compensation of the independent contractor at a rate to be determined independently by defendants and the independent contractor.

49. The mitigation plan must, among other things, set forth the overall objectives of the mitigation to be accomplished, the specific actions that will be required to meet the objectives, the specific permits and authorizations required to carry out those actions, identifiable metrics for determining the successful completion of the specific actions, a timetable for achieving milestones, post-completion monitoring, and an identification of the type or types of contractors, equipment, materials and personnel necessary, along with equipment time estimates to complete the specific actions identified in the mitigation plan.

50. At a minimum, the mitigation plan must encompass the following objectives:

a. The Social Garden will be replanted with fruit trees.

b. The area immediately surrounding the Social Garden, between the area identified and marked as the “Approximate Limits of Cleared Area in the Vicinity of ‘Social Garden’ Based on Field Observations April 2012,” and the area identified as “Approximate Limits of Cleared Area in the vicinity of the ‘Social Garden’ based on 2005 aerial Photo from USGS” on Figure 5 shall be restored to its natural condition by planting native trees and foliage on or near the crest of slopes and in cleared areas around the Social Garden with particular emphasis being placed on addressing soil and erosion stabilization and mitigating drainage problems identified by the independent contractor in the mitigation plan.

c. The road from the Social Garden to the river shall be decommissioned. The decommissioning shall include the remediation and stabilization of cut banks and fill slopes, mitigation of erosion and drainage problems, and augmentation of infiltration on the road surface. In addition, natural drainage patterns shall be reestablished and native trees and foliage shall be replanted.

d. The cross-canyon road and spur road shall be decommissioned. The decommissioning shall

1 include removal of fill, restoration of fully functional wetlands, removal of the culvert from the
 2 perennial stream and full restoration of stream function. There shall also be a remediation and
 3 stabilization of cut banks and fill slopes, erosion and drainage problems shall be mitigated, natural
 4 drainage patterns shall be reestablished, infiltration on the road surface shall be increased, and native
 5 trees and foliage shall be replanted.

6 e. All cables, platforms, other hardware, and attaching devices to and around standing trees on
 7 the Subject Parcel shall be removed, and all necessary measures shall be taken in, on, and around the
 8 impacted trees to protect the long-term health of trees to which such cables, platforms, hardware and
 9 devices were attached, along with those trees which suffered others kind of injury, such as limbing, from
 10 defendants' zipline operation and suspension bridge.

11 f. All areas used for landings or otherwise affected by defendants' ziplines and suspension
 12 bridge shall be restored to natural conditions, including any pathways to and from those areas, which
 13 shall include the removal of all log crib stairways and pathways and stabilization of slopes where trails
 14 and pathways were constructed, and the replanting of native trees and foliage.

15 g. All areas cleared by defendants as and for corridors for ziplines shall be replanted with
 16 native trees and foliage.

17 h. Invasive species shall be removed and eliminated from the Subject Parcel and the adjoining
 18 National Forest System land in proximity to any of the areas described above where soil disturbance was
 19 caused by any of defendants' activities.

20 51. Before the mitigation plan can go into effect, a final version of the mitigation plan must be
 21 submitted for review and approval by authorized representatives of the U.S. Forest Service and the
 22 U.S. Army Corps of Engineers. If either of those representatives conclude that the mitigation plan as
 23 drafted does not satisfactorily address the mitigation goals set forth above, it shall be returned to the
 24 independent contractor to revise the plan within a specific time to address the identified concerns and
 25 then be resubmitted for review and approval.

26 *ii. Plan Execution*

27 52. Defendants, current or former employees of the defendants, or relatives of the defendants
 28 shall not be allowed to perform work or to direct the performance of work specified in the mitigation

1 plan, except that defendants may, at their own risk, remove hardware and cables.

2 53. Defendants will hire a qualified specialist suitable to and approved by an authorized
3 representative of the U.S. Forest Service and the U.S. Army Corps of Engineers to carry out the
4 mitigation plan and to oversee all aspects of the restoration work. The qualified specialist should have
5 demonstrated knowledge and experience in the remediation of damage to wetlands and streams,
6 reforestation, remediation of road damage and slope stabilization. The qualified specialist will be the
7 primary point of contact with the U.S. Forest Service and the U.S. Army Corps of Engineers with
8 respect to the execution of the mitigation plan. Defendants shall be solely responsible for the
9 compensation of the qualified specialist at a rate agreed to between the qualified specialist and
10 defendants.

11 54. The qualified specialist will be responsible for providing the U.S. Forest Service and the
12 U.S. Army Corps of Engineers with a quarterly progress report identifying the activities in advancement
13 of the mitigation plan that occurred during the preceding quarter and the activities in advancement of the
14 mitigation plan that are expected to be accomplished in the next quarter. In addition, if expected
15 mitigation activities were not accomplished during the preceding quarter, the qualified specialist shall
16 state the reason or reasons for the inability to meet anticipated objectives.

17 55. If at any time the U.S. Forest Service or the U.S. Army Corps of Engineers determine that
18 the qualified specialist is not fulfilling the objectives of the mitigation plan in a timely or acceptable
19 manner, the U.S. Forest Service or the U.S. Army Corps of Engineers may require defendants to replace
20 the qualified specialist with another qualified specialist who meets the criteria set forth in Paragraph 53
21 and who is approved by an authorized representative of the U.S. Forest Service and the U.S. Army
22 Corps of Engineers.

23 56. The qualified specialist shall have the authority to retain contractors on defendants' behalf to
24 carry out the mitigation plan. The qualified specialist will propose contractors to the U.S. Forest Service
25 and the U.S. Army Corps of Engineers. The proposed contractors may be rejected for any reason. The
26 Forest Service shall have 10 business days from the date it receives the name of a proposed contractor
27 from the qualified specialist to accept or reject the contractor. The Forest Service shall have an
28 additional five business days to accept or reject a contractor upon providing oral or written notice to the

1 qualified specialist. Should the U.S. Forest Service or the U.S. Army Corps of Engineers decline to
2 approve any of the contractors proposed by the qualified specialist, the qualified specialist may select
3 and hire a contractor from a list provided by U.S. Forest Service and the U.S. Army Corps of Engineers.
4 Compensation of the contractors retained by the qualified specialist on defendants' behalf shall be solely
5 the responsibility of defendants.

6 57. Defendants shall furnish proof of insurance, such as a certificate of insurance, to the Forest
7 Service prior to the initiation of mitigation and restoration work and each year thereafter until the
8 mitigation plan has been fully implemented as determined by the U.S. Forest Service. Defendants shall
9 require and obtain the same from all contractors hired by defendants for all aspects of the restoration
10 work. The Forest Service reserves the right to review and approve any insurance policy prior to
11 issuance. Exclusions listed on the Certificate of Insurance shall not include any of the activities covered
12 under the Consent Decree. Defendants shall send an authenticated copy of any insurance policy
13 obtained pursuant to this clause to the Forest Service immediately upon issuance of the policy. Any
14 insurance policy obtained by defendants pursuant to this clause shall name the United States
15 Government as an additional insured, and the additional insured provision shall provide for insurance
16 coverage for the United States as required under this clause. In the certificate holder box, United States
17 Government c/o USDA Forest Service shall be listed. Such policies also shall specify that the insurance
18 company shall give 30 days prior written notice to the Forest Service of cancellation of or any
19 modification to the policy. The required minimum coverage shall be \$1,000,000 Combined Single
20 Limit covering losses associated with all restoration work required by this Consent Decree arising from
21 personal injury or death and third party property damage. Minimum amounts of coverage and other
22 insurance requirements may be reviewed and revised annually at the sole discretion of the U.S. Forest
23 Service. The following additional insured clauses shall appear verbatim on the face of the Certificate of
24 Insurance or Binder and as a clause or an endorsement in the insurance policy:

25 "It is understood and agreed that the United States Government is additional insured solely as
26 respects liability arising from operations of the named insured."
27
28

1 “It is understood and agreed that the coverage under this policy will not be changed or its
2 provisions changed or deleted before thirty (30) days written notice to the:

3 United States Government,
4 c/o Columbia River Gorge National Scenic Area
5 902 Wasco, Suite 200
6 Hood River, OR 97031
7 ATTN: Pam Campbell”

8 58. Defendants will obtain all necessary federal, state and local permit(s) and authorizations for
9 performance of all work specified in the mitigation plan. All requirements specified in said permit(s)
10 must be complied with during implementation of all mitigation work.

11 59. Defendants shall protect, in place, all public land survey monuments, private property
12 corners, and Forest boundary markers. In the event that any such land markers or monuments are
13 destroyed in the exercise of the requirements of the Consent Decree, depending on the type of
14 monument destroyed, defendants shall see that they are reestablished or referenced in accordance with
15 the specifications of the Forest Service at defendants’ expense. Further, defendants shall cause such
16 official survey records as are affected to be amended as provided by law.

17 60. Until such time as the mitigation plan is fully and finally executed, authorized
18 representatives of the U.S. Forest Service and the U.S. Army Corps of Engineers may enter and inspect
19 open areas of the Subject Parcel without prior announcement or permission during normal business
20 hours.

21 61. If monitoring, as specified in the Mitigation Plan, indicates further action is needed within
22 five (5) years of completion of the restoration work, defendants agree to complete the necessary work as
23 approved by authorized representatives of the U.S. Forest Service and the U.S. Army Corps of
24 Engineers. All work must be completed by a qualified specialist approved by the U.S. Forest Service
25 and the U.S. Army Corps of Engineers.

26 62. Defendants hereby stipulate and agree that they shall make no request to an authorized
27 representative of the U.S. Forest Service under Part III, Paragraph B of the Conservation Easement Deed
28 until all mitigation has been completed under this Consent Decree to the full satisfaction of the
U.S. Forest Service. Until such time, it is understood and agreed by and between the parties that the

1 authorized representative of the U.S. Forest Service may deny or summarily refuse to consider or act
2 upon such request.

3 VI. STIPULATED PENALTIES AND ENFORCEMENT OF DECREE

4 63. Unless excused by the provisions of Section VII (Force Majeure) below, defendants shall
5 incur the following stipulated penalties for failure to comply with any requirement of this Consent
6 Decree. Non-compliance with the Consent Decree shall include, but not be limited to, the failure to
7 make timely payment of sums due and owing to the independent contractor, the qualified specialist, or
8 any person or entity who has provided or is anticipated to provide equipment, materials or labor
9 necessary to carry out the mitigation plan. However, this provision shall not apply to any refusal by
10 defendants to pay an independent contractor or other person on the basis of a certification by the
11 Qualified Specialist that a certain billed or billable amount should not be paid because of a failure of the
12 independent contractor or other person to provide the materials or service as agreed. The stipulated
13 penalties shall be paid within five (5) days of the day of non-compliance.

14 A. For day 1 up to and including day 30 of non-compliance: \$50.00 per day.

15 B. For day 30 up to and including day 60 of non-compliance: \$250.00 per day.

16 C. For day 60 and beyond of non-compliance: \$500.00 per day.

17 Said civil penalties are non-dischargeable pursuant to 11 U.S.C. § 523(a)(7).

18 64. Non-compliance will be deemed established by the sending of a written notice of the action
19 or inaction determined by the U.S. Forest Service or the U.S. Army Corps of Engineers to be non-
20 compliant within 72 hours of the observance thereof. Such notice will be sent by regular or certified
21 mail to:

22 Derek A. Hoyte
Columbia Pacific Enterprises, Inc.
23 P.O. Box 646
Haiku, Hawaii 96708

24 Defendants may invoke the dispute resolution provisions set forth in Section VIII of this Consent Decree
25 in response to any such determination of non-compliance. For purpose of calculating the amount of the
26 stipulated penalty, day 1 of non-compliance will be the date that non-compliance commenced, or the
27 date of the written notice, whichever is earlier.
28

65. Any stipulated penalties incurred under this Consent Decree shall be paid in accordance with instructions provided to defendants by the Financial Litigation Unit of the United States Attorney's Office for the Western District of Washington.

66. In the event that defendants fail to make timely payment of any of the monies due pursuant to this Consent Decree, interest will be charged at the rate of 6% per annum from the time payment is due until the time it is made.

67. Nothing in this Consent Decree shall be construed to limit any other remedies available to the United States for violations of this Consent Decree, such as the institution of contempt proceedings, or any provisions of law, including 33 U.S.C. § 1364. The stipulated penalties set forth above shall not limit the United States' right to apply to the Court for the maximum civil penalties allowed by the CWA per day of violation of the CWA. Any disputes about the liability of defendants for stipulated penalties that cannot be resolved by the parties hereto shall be resolved by motion to this Court, in accordance with the Dispute Resolution provisions of Section VIII, below.

VII. FORCE MAJEURE

68. Defendants shall perform the actions required under this Consent Decree within the time limits set forth or approved herein, or under the mitigation plan which will be prepared pursuant to Section V.D.i. of this Consent Decree unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A delay in obtaining or an inability to obtain a federal, state, or local permit can be a force majeure event provided that defendants have acted timely and made a good faith effort to obtain a permit, have timely and fully paid any necessary fee associated with the permit, have timely and thoroughly responded to all requests for information from the permit-issuing agency, and are not otherwise at fault in causing a delay in or denial of the issuance of a permit. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate

1 events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or
 2 ownership or possession of a site.

3 69. If defendants believe that a Force Majeure event has affected defendants' ability to perform
 4 any action required under this Consent Decree or the mitigation plan, defendants shall notify the United
 5 States in writing within ten (10) calendar days after the event by mailing such notice to: (1) the Area
 6 Manager, Columbia River Gorge National Scenic Area, U.S. Forest Service; (2) the District Engineer,
 7 U.S. Army Corps of Engineers, Seattle District, and (3) the United States Attorney for the Western
 8 District of Washington. Such notice shall identify this Consent Decree by case name and case number
 9 and include a discussion of the following:

- 10 A. what action has been affected;
- 11 B. the specific cause(s) of the delay;
- 12 C. the length or estimated duration of the delay; and
- 13 D. any measures taken or planned by defendants to prevent or minimize the delay
 14 and a schedule for the implementation of such measures.

15 Defendants may also provide to the United States any additional information that they deem appropriate
 16 to support their conclusion that a Force Majeure event has affected their ability to perform an action
 17 required under this Consent Decree or the mitigation plan. Failure to provide timely and complete
 18 notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event
 19 in question.

20 70. If the United States determines that the conditions constitute a Force Majeure event, then the
 21 deadline for the affected action shall be extended by the amount of time of the delay caused by the Force
 22 Majeure event. Defendants shall coordinate with the U.S. Forest Service and the U.S. Army Corps of
 23 Engineers to determine when to begin or resume the operations that had been affected by any Force
 24 Majeure event.

25 71. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or
 26 whether the length of time for fulfilling the provision of the Consent Decree or mitigation plan at issue
 27 should be extended, any party may seek a resolution of the dispute under the procedures in Section VIII
 28 of this Consent Decree.

72. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of defendants and any entity controlled by defendants, including their contractors and consultants; (2) that defendants or any entity controlled by defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

VIII. DISPUTE RESOLUTION

73. Any dispute arising under or with respect to this Consent Decree or the mitigation plan shall in the first instance be the subject of informal negotiations among the parties to this Consent Decree for a period of twenty (20) working days from the time notice of the existence of the dispute is given. The period for negotiations may be extended by written agreement of the parties to this Consent Decree.

74. If a dispute cannot be resolved by informal negotiation under Paragraph 73, above, then the position advanced by the United States shall be considered binding unless, within twenty-one (21) days after the end of the informal negotiations period, defendants file a petition with this Court setting forth the matter in dispute, the efforts made by the parties to resolve it, and defendants' proposed resolution. The United States shall have twenty-one (21) days to file a response to the petition of defendants with an alternative proposal for resolution of the dispute. In proceedings on any dispute under this paragraph, defendants shall have the burden of showing that their proposal meets the requirements of this Consent Decree and the mitigation plan.

75. The filing of a petition asking the Court to resolve a dispute shall not of itself extend or postpone any obligation of defendants under this Consent Decree or the mitigation plan, but the payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. To the extent defendants show that a delay or other noncompliance was due to a force majeure event or otherwise prevail on the disputed issue, stipulated penalties shall be excused.

76. It is understood and agreed by the parties that the purpose of this Consent Decree is to resolve legal causes of action that the United States has against defendants and that defendants are afforded no enforceable rights by this Consent Decree against the United States except as set forth in this Section of the Consent Decree establishing a mechanism limited to the resolution of disputes arising under the express terms of this Consent Decree. Defendants hereby stipulate and agree, on behalf of

1 themselves, their successors-in-interest, and anyone acting for them or on their behalf, that they shall not
 2 invoke the dispute resolution process set forth in this section of the Consent Decree for the purpose of
 3 resolving disputes arising under the terms of the Conservation Easement Deed. In particular, defendants
 4 may not invoke this provision for the purpose of obtaining an interpretation or construction of the terms
 5 of the Conservation Easement Deed, nor may defendants invoke this provision to challenge or otherwise
 6 seek review of any denial by the U.S. Forest Service of a request by defendants that they be allowed to
 7 engage in some activity on or use of the Subject Parcel on grounds that the U.S. Forest Service has
 8 unreasonably denied the request. Defendants hereby stipulate and agree that such denials by the
 9 U.S. Forest Service shall be regarded to be final and not subject to challenge or dispute resolution by
 10 defendants, their successors-in-interest, or anyone acting for them or on their behalf under any clause or
 11 provision of this Consent Decree, and it is hereby further stipulated and agreed that defendants may only
 12 challenge such a denial by filing a separate proceeding in a venue of competent jurisdiction. The parties
 13 further stipulate and agree that should defendants or their successors-in-interest, or anyone acting for
 14 them or on their behalf, seek to invoke the dispute resolution provisions of this Consent Decree for the
 15 purpose of obtaining an interpretation or construction of the terms of the Conservation Easement Deed,
 16 or to challenge or otherwise seek review under any clause or provision of this Consent Decree of any
 17 denial by the U.S. Forest Service of a request by defendants or their successors-in-interest, or anyone
 18 acting for them or on their behalf that they be allowed to engage in some activity on or use the Subject
 19 Parcel in some manner on grounds that the U.S. Forest Service has unreasonably denied the request, that
 20 the petition should be deemed non-justiciable and should be denied summarily by the Court. The United
 21 States shall have no obligation under the Consent Decree to respond to the petition and may simply
 22 inform the Court that such a petition is non justiciable under the Consent Decree and that the Court
 23 should deny the petition summarily under the terms of this paragraph.

24 IX. CONTINUING JURISDICTION OF THE COURT

25 77. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent
 26 Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or
 27 appropriate for construction or execution of this Consent Decree. During the pendency of the Consent
 28 Decree, either the United States or defendants may apply to the Court for any relief necessary to

1 construe and effectuate the Consent Decree not inconsistent with the terms hereof. However, the parties
 2 stipulate and agree that defendants, their successors-in-interest, or anyone acting for them or on their
 3 behalf, may not invoke the Court's jurisdiction under this provision for the purpose of resolving disputes
 4 arising under the Conservation Easement Deed, nor to obtain any interpretation or construction of the
 5 terms of the Conservation Easement Deed, nor to challenge any denial by the U.S. Forest Service of a
 6 request by defendants that they be allowed to engage in some activity on or use of the Subject Parcel on
 7 grounds that the U.S. Forest Service has unreasonably denied the request or for any other reason.

8 X. MODIFICATION

9 78. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final
 10 judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless
 11 signed by the United States and defendants and approved by the Court.

12 XI. ATTORNEYS' FEES AND COSTS

13 79. Except as otherwise specifically provided in this Consent Decree, each party to this Consent
 14 Decree shall bear its own costs and attorneys' fees in this action.

15 XII. APPEALABILITY

16 80. This Consent Decree is not appealable by any party.

17 XIII. PUBLIC COMMENT

18 81. Defendants consent to the entry of this Consent Decree without further notice. The parties
 19 acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the
 20 United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and
 21 comment. The United States reserves the right to withhold or withdraw its consent to the entry of this
 22 Consent Decree if the comments received disclose facts which lead the United States to conclude that
 23 the proposed judgment is inappropriate, improper, or inadequate. Defendants agree not to withdraw
 24 from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has
 25 notified defendants in writing that it no longer supports entry of the Consent Decree.

XIV. RECORDATION

82. A copy of this Consent Decree may be recorded in Skamania County and elsewhere as appropriate. However, the failure to record this Consent Decree shall not affect its validity.

IT IS SO ORDERED.

DATED this _____ day of _____, 2014.

BENJAMIN H. SETTLE
United States District Judge

ON BEHALF OF THE UNITED STATES:

ROBERT G. DREHER
Acting Assistant Attorney General
Environment and Natural Resources Division

JENNY A. DURKAN
United States Attorney
Western District of Washington



BRIAN C. KIPNIS
Assistant United States Attorney

DATED: 2/28/14

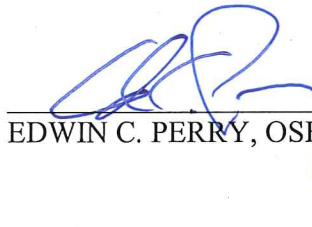
1 ON BEHALF OF DEFENDANTS DEREK HOYTE, COLUMBIA CREST PARTNERS, L.L.C.,
2 AND COLUMBIA PACIFIC ENTERPRISES, INC:

3
4 

5 DEREK HOYTE
6 Defendant

DATED: 11/13/13

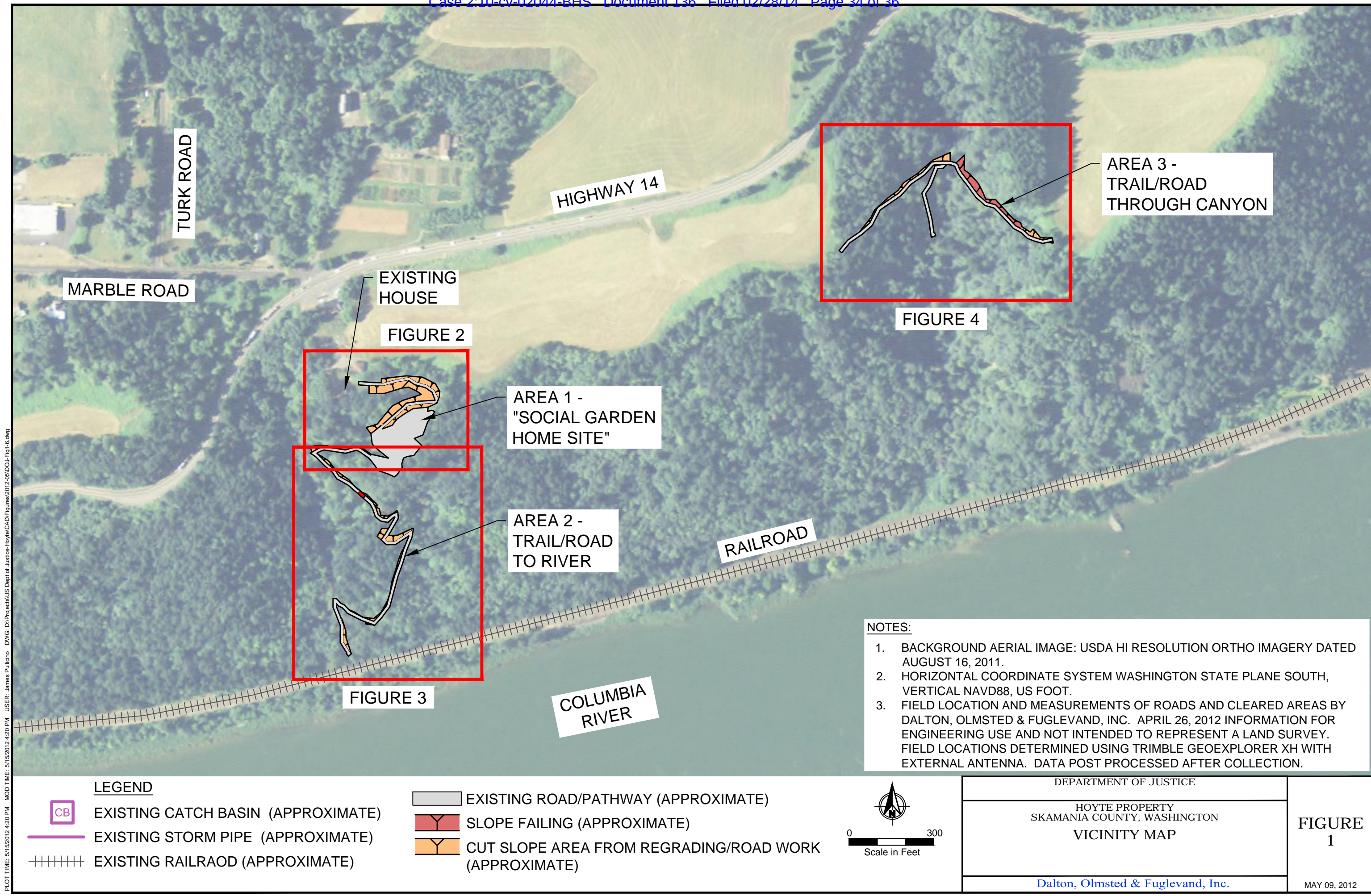
7 TONKON TORP, L.L.P.

8
9 

10 EDWIN C. PERRY, OSB No. 843227

DATED: 11/13/13

FIGURE 1



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FIGURE 5

